UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CP ANCHORAGE HOTEL 2, LLC, d/b/a HILTON ANCHORAGE And UNITE HERE! LOCAL 878, AFL-CIO	Case Nos. 19-CA-193656, et al.

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

This case asks the Board to consider whether, when an employer abruptly chooses to hold management meetings exclusively in the same space and at the same time that a Union meets with unit members taking their break, that abrupt change reasonably creates an impression of employer surveillance of protected activity under Section 8(a)(1) of the National Labor Relations Act (the Act). 11 U.S.C. 158(a)(1). Binding precedent establishes that it does. It also asks the Board to consider whether, when those Union meetings happened regularly at the same time, on the same days, and without management's presence or involvement for nearly a decade, that regularity created a binding past practice, and whether the Hotel's unilateral change to that practice violated its duty to bargain under Section 8(a)(5) of the Act. 11 U.S.C. 158(a)(5). Established law indicates that both are true.

CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage (the Hotel or the Hilton) operates the Hilton Hotel in Anchorage, Alaska. UNITE HERE! Local 878 (the Union or Local 878) represents many of the employees who work at the Hotel, and the case at hand revolves around one of the Hotel's many attempts to frustrate the bargaining process by rendering those employees' decision to select an exclusive bargaining representative futile. Specifically, this case addresses the Hotel's sudden decision to host management meetings in the employee cafeteria at the same time as long-established Union meetings in the same space every day. The Union contends that those meetings were a unilateral change to the terms and conditions of unit members' employment, and also gave those unit members' the impression they were being surveilled by management, an unlawful interference with their Section 7 rights.

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The Union filed unfair labor practice charges regarding that interference, and after investigating the charges Region 19 issued a complaint. In October and November 2019, Administrative Law Judge Andrew S. Gollin (the ALJ) held a hearing concerning those charges, along with other claims against the Hotel from the same time period. The ALJ correctly found that the Hotel had unlawfully restricted Union access to the hotel; failed to bargain in good faith by prematurely declaring impasse over revisions to its Union access policy and unilaterally implementing that policy; unilaterally restricted Union access by calling the Anchorage Police Department to report Union officials when they did not comply with that policy; failed to timely provide the Union with responses to information requests; and dealt directly with employees. ALJ Decision, 37-38. The ALJ dismissed the Union's Section 8(a)(1) charge regarding the Hotel's surveillance of employees in its cafeteria, as well as its 8(a)(5) charge regarding the Hotel's unilateral change to the Union's access to unit members in the cafeteria without the presence of management.

The Union respectfully requests that the Board modify the ALJ's decision regarding its Section 8(a)(1) and 8(a)(5) claims. The ALJ incorrectly found that the Hotel's change in practice was not substantial enough to give the impression of surveillance; however, established Board law indicates the opposite is true. Likewise, the ALJ found that no evidence existed that management's purpose in hosting stand-up meetings concurrently with union meetings was to monitor protected activity; however, that is immaterial to a Section 8(a)(1) surveillance analysis. Finally, the ALJ found that the General Counsel had not established that the Union's nearly decade-old pattern of meeting at the same time and in the same place with Union employees was a binding past practice; accordingly, he also found that no Section 8(a)(5) violation had occurred,

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because no unilateral change could take place. That decision conflicts with established Board law regarding what constitutes a binding past practice.

The Board should therefor find merit in the Union's exceptions, reverse those portions of the ALJ's decision, and hold the Hotel liable for its unlawful interference with its employees' Section 7 rights and its violation of its duty to bargain under the Act.

FACTUAL BACKGROUND

The Hilton Anchorage is a hotel located in Anchorage, Alaska. UNITE HERE! Local 878 represents many of the employees who work at the Hotel as part of a bargaining unit that includes bartenders, banquet captains and servers, bellmen, cashiers, housekeepers, maintenance employees, and other workers employed by the Hilton. Jt. Ex. 1 ¶¶ 1, 5-6.

The parties' last collective bargaining agreement expired on August 31, 2008. Jt. Ex. 2. On March 30, 2009, after some bargaining had occurred, the Hotel advised the Union of its position that the parties were at an impasse in negotiations. Jt. Ex. 3. The Hotel subsequently implemented parts of its March 11, 2009, proposal on April 13. *Id.*; *see also* Jt. Ex. 4. After renewed bargaining in 2013-2014, the Hotel declared that impasse still existed and unilaterally implemented a new health care proposal (effective April 1, 2014). Jt. Ex. 5. The parties have generally operated under those terms, along with the terms set forth in the expired agreement that the Hotel had not altered, since that date. At the time of this latter implementation, the Hotel asserted that impasse existed due to the parties' disagreement regarding four issues: wages, successor language, health insurance coverage, and the number of rooms housekeepers were required to clean on each shift. *Id.*

As of February 2017, Soham Bhattacharyya was the interim General Manager of the Hotel. Tr. 666:1-17; 724:15-21. He remained in that position until October 10, 2017, when he

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was transferred to another hotel. Tr. 666:1-17; 724:15-21; J. Ex. 1 ¶ 30. He was succeeded by Stephen Rader, who had previously served as the Hotel's Assistant Manager. *Id.* Marvin Jones is Local 878's President, Tr. 66:24-67:2, and Danny Esparza serves as its Vice President. Tr. 66:1-9; 68:5-11. Dayra Valades works as an organizer for the Union. Tr. 381:17-382:2.

The Hotel generally provides a free meal to its employees, including both unit members and non-union and management employees, in the designated employee cafeteria at 10 a.m. each morning, when most of its employees take their lunch break. Jt. Ex. 1, ¶ 11 Employees who choose to stay at the hotel for the lunch break are paid for their time, while employees who leave the hotel are not paid. *Id.* at ¶ 12-13. Mr. Esparza had generally visited the Hotel each week day during that break since 2010. Tr. 68:23-697:7, 139:22-140:3, 154:23-155:3, 382:8-25, 384:6-8, 676:6-14; J. Ex 2 at 5; J. Ex. 4 at 6. Starting in 2017, Ms. Valades would join him. Tr. 74:1-8. Generally, they would stop by the front desk to inform employees they would be in the cafeteria before proceeding downstairs to the basement of the facility, where the cafeteria was located. Tr. 69:22-23, 73:5-15; 383:16-384:2. The Union's representatives usually did not notify any member of the Hotel's management when visiting the premises. Tr. 140:10-12, 162:3-18. At around the same time, managers usually also held a stand-up meeting around 10 a.m. near Mr. Bhattacharyya's office on the fourth floor of the Hotel. Tr. 83:25-85L5, 388:1-5. Of the entire management team, only the Hotel's Human Resources Manager, Daniel McClintock, and Ivan Tellis, the Hotel's Director of Housekeeping, regularly ate lunch in the cafeteria while Mr. Esparza and Ms. Valades visited. Tr. 75:25-77:-13, 151:12-1, 384:9-385:5, 385:19-386:14, 412:10-23, 603:11-605:19, 628:12-629:15, 730:10-721:13; J. Ex. 1 ¶ 30.

On February 7, 2017, around 10 am, Mr. Esparza and Mr. Valades entered the cafeteria as usual and saw Mr. Bhattacharyya, Mr. Rader, Mr. Tellis, Mr. McClintock, Maintenance

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Manager Bob Best, Director of Food and Beverage Leonard Esquivel, and Director of Rooms Brandon Donnelly holding a meeting in the middle of the cafeteria rather than in their usual location on the fourth floor. Tr. 79:5-81:8, 3867:3-25, 653:17-23, 663:0-12, 683:9-23; 764:22-765:12; GC Ex. 4; J. Ex. 1 ¶ 30. Mr. Bhattacharyya asked Mr. Esparza and Ms. Valades if they wanted to be a part of the meeting, and Mr. Esparza declined before walking with Ms. Valades to a smaller room attached to the cafeteria where some laundry department employees were eating. Tr. 85:6-19, 164:4-6, 167:6-10. When Mr. Esparza and Ms. Valades greeted them, the employees greeted them in turn and, rather than having a conversation with them as usual, returned to their meals. Tr. 390:13-19. Mr. Esparza and Ms. Valades left the cafeteria after 20 minutes rather than their usual minimum visit of 30 minutes. Tr. 69:8-11, 384:3-5, 390:12-19.

The managers held another meeting in the cafeteria at the same time the next day. Tr. 86:21-87:9; 390:20-391:16; 683:9-684:6. Mr. Esparza asked Mr. Bhattacharyya why he had moved the meeting to the cafeteria, and Mr. Bhattacharyya responded that he simply wanted to let employees know how good a job they were doing and express appreciation to the staff. Tr. 87:10-88:18. Management continued to meet in the cafeteria every weekday at 10 a.m., and would remain in the cafeteria until Union representatives left half an hour later. Tr. 88:19-90:23, 90:10-16, 226:23-227:3, 393:5-15.

Mr. Esparza noticed that when he interacted with employees in the cafeteria after February 7, some unit members would turn their heads to see who was behind them before communicating with him. Tr. 106:12-108:6. They also began to greet him in whispered tones. Tr. 112:24-114:6, 414:19-414. Ms. Valades also noticed that fewer employees would talk to her after the managers began meeting in the cafeteria, and that their conversations with employees started

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to include more small talk and less substantial discussions of union business and working conditions. Tr. 412:24-414:21, 415:11-20.

On February 22, the Union filed unfair labor practice charges, including Case No, 19-CA-193656, against the Hotel regarding managers' repeated surveillance of employees while they met with Union representatives in the cafeteria. GC Ex. 1(k), GC Ex. 1(o). Region 19 investigated the charges and issued a complaint.

In May, Mr. Esparza and Ms. Valades continued to see managers eating or talking with employees in the cafeteria during the employees' 10 a.m. break. Tr. 94:18-95:6, 397:16-399:2. On several occasions, Mr. Esparza noticed that managers would follow him from the larger room in the cafeteria where they were eating to the smaller room when he went there to speak with employees. Tr. 95:7-96:6, 97:1-99:5, 399:3-400:2, 401:7-11. By 2018, only two or three managers would appear in the cafeteria during employees' meetings with the Union, but employees still looked around before talking to Union representatives. Tr. 114:15-115:17.

The ALJ held a hearing on the charges in October and November 2019 and issued a decision on March 4, 2020. The Union's exceptions to the ALJ's decision regarding allegations of surveillance in violation of Section 8(a)(1), which accompany this brief, is timely filed.

QUESTIONS PRESENTED

1. Did the General Counsel establish that, when management significantly increased its presence in the employee cafeteria and began mingling with employees during the times union representatives generally met with unit members, employees reasonably would believe that management was in the cafeteria for the purpose of surveilling their protected activity, a violation of Section 8(a)(1) of the Act?

2. Did the General Counsel establish that the Union's practice of visiting the Hotel each weekday at the same time, the Hotel's managers' practice of not interacting with employees in the cafeteria during that time were binding past practices, and were the Hotel's unilateral changes to those practices thus violations of its duty to bargain under Section 8(a)(5)?

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ARGUMENT

I. The ALJ erred in finding that management's presence in the cafeteria was not "out of the ordinary" and thus was not coercive.

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. 29 U.S.C. 158(a)(1). Whether management intended to interfere with an employee's Section 7 rights is irrelevant to a Section 8(a)(1) analysis; the test only concerns the effects or likely effects of the employer's conduct, and a violation can occur in the absence of any discriminatory or unlawful motive or anti-union animus. *American Freightways Co.*, 124 NLRB 146, 147 (1959); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). The Board has held that an employer violates Section 8(a)(1) when it engages in observation in a manner that is "out of the ordinary" and thereby coercive. *See Town & Country Supermarkets*, 340 NLRB 1410 (2004); *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2006).

The ALJ erred in determining both that management's increased presence in the cafeteria in February 2017 was not so substantial that it would give employees the impression they were being surveilled and that the lack of evidence that management intended to monitor employees meant the General Counsel had failed to establish a violation. Neither analysis is correct. Rather, management's substantial increase in presence in the cafeteria in February 2017 falls in line with that in *Sheraton Anchorage*, 363 NLRB No. 6 (2015) which the Board found violated Section 8(a)(1). Further, whether management entered the cafeteria for the purpose of surveilling protected activity is irrelevant to an 8(a)(1) analysis; what matters is the impact management's presence had on employees. The Board should modify the ALJ's decision accordingly.

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A. Management's presence in the cafeteria significantly increased after February 2017.

The Board has already found that, when the presence of supervisors and managers in an employee cafeteria significantly increases "in a manner out of [management's] ordinary practice," it amounts "to unlawful surveillance in the employee cafeteria" in violation of Section 8(a)(1). *Sheraton Anchorage*, 363 NLRB No. 6 (2015). Contrary to the ALJ's analysis, the circumstances in this case are nearly identical.

The ALJ erred in finding that, unlike in *Sheraton Anchorage,* evidence in this case did not establish that management's presence significantly increased. ALJ Decision at 22. In fact, it tripled. Before February 2017, only two managers appeared regularly; one for a short lunch break each day and one occasionally to either deliver messages to employees or to eat a short lunch separately. Tr. 76:23-79:1; 285:24-286:23. After February 7, six to seven managers attended instead. Tr. 79:5-81:8, 3867:3-25, 653:17-23, 663:0-12, 683:9-23; 764:22-765:12; GC Ex. 4; J. Ex. 1 ¶ 30. There is no evidence that any of the Hotel's supervisors or managers were regularly present in the cafeteria before February 7, 2017, when Mr. Bhattacharyya began holding meetings in the cafeteria while Union representatives met with employees.

The ALJ's decision goes on to note that, unlike in this case, in *Sheraton Anchorage*,

> the supervising chef, who previously never went to the cafeteria during the day, came and stood with his arms folded for up to 15 minutes as he monitored employees; the housekeeping manager and the human resources director who seldom came to the cafeteria both began making multiple visits a week and staying for 30 minutes each time; and the engineering chief began coming to the cafeteria and talking with employees . . . for as long as the union representative[s] remained in the cafeteria.

ALJ Decision at 21. But the facts here are similar, in that, while only two managers even visited the cafeteria before February, on February 7 the Hotel's General Manager, Assistant General Manager, Maintenance Manager, Director of Food and Beverage, Director of Security, and Director of Rooms all began appearing for 25-30 minutes at a time. Tr. 667:6-10; 668:4-11;

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671:23-672:21. They would gather before Union representatives arrived, and were still in the room when representatives left roughly thirty minutes later. Tr. 90:10-16; 226:23-227:3. Those managers also deliberately mingled with employees during times and in spaces they knew the Union typically used to interact with Union members, itself a violation of Section 8(a)(1). *See, e.g., Liberty Nursing Homes, Inc.*, 245 NLRB 1194, 1200 (1979) (employer violates Section 8(a)(1) when its supervisors abruptly changed their practice of eating separately and "deliberately mingled with employees in the dining areas utilized [. . .] during break and lunch periods."). If anything, the Hotel's change in performance exceeded those the Board already found to violate Section 8(a)(1) in *Sheraton Anchorage.*

B. Whether management's purpose in the cafeteria was to monitor employees is immaterial.

The ALJ also mistakenly gives weight to the management's purpose in entering the cafeteria. In fact, "interference, restraint, and coercion under Section 8(A)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the act." *Sheraton Anchorage,* 363 NLRB No. 6 (citing *American Freightways Co.*, 124 NLRB 146, 147 (1959)).

To that end, an employer violates Section 8(a)(1) if it merely creates the impression among employees that it is engaged in surveillance, because highlighting its own "anxiety" concerning union activities tends to also inhibit an employee's future union activities. *CBS Records Division,* 223 NLRB 709 (1976) (employer's focusing of a closed-circuit camera on a building used by the union during an organizing campaign violated 8(a)(1) even though no actual surveillance was ever conducted). The Board has affirmed an ALJ decision finding an employer's use of video cameras creates an impression of surveillance even when the cameras

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were never turned on. *Labor Ready, Inc.*, 327 NLRB 1055, 1059 (1999). That holding rested on the fact that what matters in a surveillance analysis is not whether surveillance actually took place, whether the employer's purpose was surveillance, or whether the employer intended to give the impression surveillance was taking place. All that matters is whether the employer's conduct could reasonably give the impression that surveillance was taking place. *Id.*

Management went from rarely appearing in the cafeteria (and even then, only briefly and individually) to appearing *en masse,* daily, and only during periods when employees traditionally met with union representatives. Examining the totality of the circumstances, there is no question management's presence in the cafeteria and interaction with employees during times they would normally have been meeting with union representatives reasonably gave the impression the Hotel was surveilling protected activity, interfering with employees' exercise of Section 7 rights. *Sage Dining Services, Inc.*, 312 NLRB 845, 856 (1993); *Brown Transportation Corp.*, 294 NLRB 969, 971-72 (1989). The ALJ erred in finding no substantial change in practice occurred and in taking into account management's potential purpose in making that change, and the Board should modify the ALJ's decision accordingly.

II. The ALJ misapplied Board precedent when analyzing whether the General Counsel had established a binding past practice and whether the Hotel's unilateral change to that practice violated Section 8(a)(5) of the Act.

The ALJ also incorrectly found that the sudden, substantially increased presence of managers in the Hotel's cafeteria during the periods in which Union representatives generally met with employees was not a unilateral change in past practice without prior notice and opportunity to bargain. ALJ Decision at 23. As evidence that the General Counsel failed to prove a binding past practice existed, the ALJ points to the Mr. Esparza's lack of knowledge of "any sort of agreement" between the Hotel and the Union that management would both refrain from

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entering the cafeteria and notify the Union before holding a meeting in the cafeteria when representatives were present. *Id.* at 23; Tr. 223. Accordingly, the ALJ found, no unilateral change was possible, because no binding past practice from which to change existed. However, that reasoning misapplies the standard for establishing a binding past practice. The Board should modify the ALJ's decision accordingly.

An employer's duty to bargain collectively includes "the duty to meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment," and "an employer's unilateral change in conditions of employment . . . is similarly a violation of 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). When an employer's practices are "regular and long-standing, rather than random or intermittent, [they] become terms and conditions of unit employees' employment," and similarly "cannot be altered without offering their collective bargaining representative notice and an opportunity to bargain over the proposed change." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

Past practices need not be universal to constitute terms or conditions of employment; they must simply be regular and longstanding. *Id.* (citing *Locomotive Fireman & Engineman*, 168 NLRB 677, 679-690 (1967)). For a past practice to be binding, it "must occur with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB at 244 (citing *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-54 (2003). The Board generally requires that, in order to be binding, a pact practice must be satisfactorily established by practice or custom, an established practice, an established condition of employment, or a longstanding practice . *See Exxon Shipping Co.*, 291 NLRB 489, 492 (1988) (citing *Granite City Steep Co.*, 167 NLRB 310,

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315 (1967); *Chef's Pantry*, 24 MRLB 775 (1985); *Brotherhood of Locomotive Firemen*, 168 NLRB 677, 680 (1967); *Gulf States*, 261 NLRB 852, 862 (1982)).

The ALJ reasons that, because Mr. Esparza was unaware of any formal agreement between the Union and the Hotel that management would not enter the cafeteria during the employees' lunch break, the General Counsel has not met the burden of "proving the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis," ALJ Decision at 23. That reasoning both misinterprets Mr. Esparza's testimony and misapplies Board law. Mr. Esparza did not testify that he was unaware of any formal agreement with the Hotel that management would not enter the cafeteria during the employees' break time; it was that he *personally* did not "ever have any sort of agreement with the general manager at the Hilton that they would not come into the employee break room between the hours of 10 and 11" or "that they would give [him] advance notice before they had a meeting in *any* area of the hotel." Tr. 223:15-23 (emphasis added). The Board's standard for a binding past practice does not turn on whether Union representatives had a personal, off-the-books agreement with management; it turns on whether a practice was so regular that employees could reasonably expect it to reoccur.

Mr. Esparza's knowledge of a formal agreement is immaterial to establishing a past practice for the purposes of a Section 8(a)(5) analysis. In contrast, the General Counsel's establishment that the Hotel had, since at least 2010, allowed the Union to meet with unit members in the cafeteria, is material, Tr. 68:23-69:7, 139:22-140:3, 154:23-155:3; 382:8-25, 384:6-8, 676:6-14; Jt. Ex. 2 at 5; Jt. Ex. 4 at 6, as is Mr. Bhattacharyya's admission that 95% of the time, Union representatives visited the facility between 10 a.m. and 11 a.m. Tr. 690:20-691:5; 728:6-15. During that time, Mr. Esparza and Ms. Valades would interact with employees.

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Tr. 74:10-23, 75:6-16. Only one manager regularly appeared during that period, and even then he spent only 10-20 minutes in the cafeteria eating his lunch and departed. Tr. 76:23-77:8. Another made intermittent appearances, usually to deliver messages or briefly eat lunch before departing. Tr. 77:17-79:1; 285:24-286:23. Both ate alone. *Id.*

That makes for seven years of repeated practice: Union representatives would arrive at the same time nearly every weekday, meet with employees for approximately the same period of time, and come upon only two managers, who occasionally ate lunch briefly in the cafeteria without intermingling with unit members. The Hotel would not interfere, and even the Hotel's general manager admitted to the practice's regularity. It is hard to imagine circumstances more exemplary of an established past practice, which makes the Hotel's 8(a)(5) violation when it abruptly began meeting during the same period all the more glaring. In that context, the ALJ should have found that the Hotel's allowing the Union to host regular daily meetings with employees in the cafeteria, as well as management's general avoidance of the cafeteria during the period and lack of interaction with employees, were binding past practices, and the Hotel violated Section 8(a)(5) of the Act when it began holding large managers' meetings in the break room during the same period without giving the Union an opportunity to bargain over that change.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board find merit to its exception and modify the ALJ's Decision accordingly.

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Respectfully submitted this 1st day of April, 2020.

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DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury under the laws of the state of Washington that on this 1st day of April, 2020, I caused the foregoing to be sent via email to:

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